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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JASON ROBERT EURICH, Defendant and Appellant.	G039648 (Super. Ct. No. 96NF2434) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Daniel J. Didier, Judge. Affirmed in part, reversed in part and remanded.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, David Delgado-Rucci and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Jason Robert Eurich was convicted of 11 counts and various enhancements relating to a series of incidents in 1995. He was sentenced to life in prison plus 15 years to life, plus a concurrent sentence of 19 years. He raises various errors, primarily regarding sentencing. We agree that sentencing on one count should have been stayed pursuant to Penal Code section 654. We also find that a discrepancy exists in the record regarding custody credits. We therefore remand the case to the trial court for the limited purpose of resentencing, and affirm in all other respects.

I

FACTS

On June 19, 1995, defendant and another man, Miguel Delgado, forcibly entered the home of M.B., whose wife, D., and children were present. M.B. was a part-time marijuana dealer. After entering the home, defendant and Delgado, apparently aware of M.B.'s drug dealing, brought in two other unidentified males to assist in their search for drugs and money. M.B. eventually turned over approximately $800 or $900. M.B. was beaten when the intruders did not find what they wanted, and eventually told them of a safe in his office which contained marijuana and other valuables.

Delgado and one of the unidentified males left with M.B., while defendant and the other man stayed with D. and the children. Before leaving, Delgado told defendant, "If I don't call, you know what to do." While they were gone, defendant sexually assaulted D. At M.B.'s office, M.B. opened a safe for Delgado that contained several pounds of marijuana and a few thousand dollars in cash.

Delgado called defendant to tell him they had what they had come for. Using phone cords, defendant tied up D. and the children on the floor. Neighbors found them and subsequently located M.B.

Several months later, during the police investigation, both M.B. and D. recognized defendant in photographs from a yearbook. He was subsequently arrested. While DNA results from 1995 were inadequate, tests conducted again in 2005 using newer techniques yielded a match between swabs taken from D. and defendant's DNA.

Defendant was charged with 12 counts relating to the incident: first degree residential burglary (count one, Pen. Code, §§ 459, 460, subd. (a));[1] robbery in an inhabited dwelling (count two, §§ 211, 212.5, subd. (a), 213, subd. (a)(1)); three counts of false imprisonment by violence (counts three, four, five, § 236); assault with a deadly weapon (count six, § 245, subd. (a)(1)); assault with a firearm (count seven, § 245, subd. (a)(2)); kidnap to commit robbery (count eight, § 209, subd. (b)); second degree robbery (count 9, §§ 211, 212.5, subd. (c)); forcible oral copulation (count 10, § 288a, subd. (c)); forcible sexual penetration by foreign object (count 11, § 289, subd. (a)(1)); and sexual battery by restraint (count 12, § 243.4, subd. (a)). The information also alleged various enhancements, including the personal use of a firearm on counts one through eight, and count 12 (§ 12022.5, subd. (a)(1)) and being armed with a firearm during the commission of all counts (§ 12022, subd. (a)(1).)

A jury found defendant guilty of 11 counts[2] and found all enhancements to be true. Defendant was sentenced to state prison for life plus 15 years to life, with a concurrent term of 19 years. The life sentence was imposed for count eight, and the sentence of 15 years to life was imposed for count 10. The determinate sentence of 19

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[1] Subsequent statutory references are to the Penal Code.

[2] With the court's permission, the prosecutor dismissed count 11 during trial.

years was imposed for count two and its enhancement (nine years plus a firearm use enhancement of 10 years). The middle terms for counts two through seven and count 12 were imposed concurrently. The sentences on counts one and nine were stayed pursuant to section 654, and all other enhancements were either stricken or stayed. Defendant received 1,127 days of presentence custody credits, which consisted of 980 days served plus 147 days of local conduct credits.

II

DISCUSSION

Counts Two and Nine

Defendant first claims he should not have been convicted of commercial robbery (count nine) because that crime was part of a continuing course of conduct with count two, the residential robbery. He also claims that count two was a lesser included offense of count nine.

"When a defendant steals multiple items during the course of an indivisible transaction involving a single victim, he commits only one robbery or theft notwithstanding the number of items he steals." (*People v. Brito* (1991) 232 Cal.App.3d 316, 326, fn. 8 (*Brito*).) The defendant can, however, be convicted of multiple counts "if each [crime] is the result of a separate independent impulse or intent. [Citations.]" (*People v. Packard* (1982) 131 Cal.App.3d 622, 626.) "The test applied . . . in determining if there were separate offenses or one offense is whether the evidence discloses one general intent or separate and distinct intents. . . . [¶] Whether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan." (*People v. Bailey* (1961) 55 Cal.2d 514, 519.) Because this issue presents a

question of fact, we uphold the trial court's conclusion if it is supported by substantial evidence. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

In *Brito,* the robbery involved a single location and a brief space of time in which the defendant leaned into the victim's vehicle, pointed a gun at the victim, "demanded gold and money" looked back at honking motorists as the victim "fled through the driver's door," shot [the victim] in the back and then drove away in the vehicle. (*Brito, supra,* 232 Cal.App.3d at p. 320.) The appellate court concluded the defendant "attempted to commit a *robbery* and during the course of events stole the vehicle." (*Id*. at p. 325.) In other words, the defendant stole an item he identified "during the same transaction." (*Id.* at p. 326.)

Here, in contrast, substantial evidence supported the jury's finding defendant committed four separate and distinct robberies. The two robberies were separated by space and time, and further separated by intervening crimes. We are unpersuaded by defendant's argument that he and Delgado were after a specific amount of marijuana. There was additional evidence that separate force and fear were used to accomplish the commercial robbery. A reasonable jury could also have found the commercial robbery was committed pursuant to a separate intent, formed only when defendant and his accomplices were unsatisfied with the fruit of the brutal home invasion. Thus, substantial evidence supports conviction for both crimes.

We also reject defendant's claim that the residential robbery is a lesser included offense of the commercial robbery. The test for a lesser included offense is whether one offense necessarily includes the commission of another. (*People v. Pearson* (1986) 42 Cal.3d 351, 355.) A residential robbery can occur without the commission of a commercial robbery, and vice versa. Therefore, it is not a lesser included offense.

Count Two and its Enhancement – Section 654

Defendant next claims that section 654 bars separate punishment for the residential robbery and the firearm enhancement because the court also imposed punishment for the kidnapping for robbery. The kidnap charge, however, was premised on the taking of M.B. to the location of the commercial robbery.

Section 654 requires that an act or omission that is made punishable in different ways by different provisions of the Penal Code may be punished under either of such provisions, "but in no case shall [it] be punished under more than one . . . ." This provision bars multiple punishment when a defendant is convicted of two or more offenses that are incident to one objective. (*Neal v. State of California* (1960) 55 Cal.2d 11; *People v. Latimer* (1993) 5 Cal.4th 1203 [reaffirming *Neal*].) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective of the actor*. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California*, *supra*, 55 Cal.2d at p. 19, italics added.)

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

Just as we found *ante* that a reasonable jury could conclude that the commercial and residential robberies were pursuant to separate intents, we find that there was no error in sentencing defendant separately for the residential robbery and the

kidnapping for robbery. The kidnapping was a prelude to the commercial robbery, the act of taking M.B. from the location of the residential robbery to the location of the commercial robbery. The evidence supports the conclusion that these were separate, divisible acts, arising from a newly formed intent to commit the commercial robbery after the residential one was unsuccessful. The firearm use enhancement was also proper. (*People v. Bracamonte* (2003) 106 Cal.App.4th 704, 711 (disapproved on other grounds in *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130, fn.8).)

The purpose of section 654 is to ensure that a defendant's punishment is commensurate with his culpability. (*People v. Perez* (1979) 23 Cal.3d 545, 549-550, fn. 3.) This policy supports punishing the defendant separately (though concurrently) for both the residential robbery and the kidnapping for robbery.

Counts Six and Seven and Enhancements – Section 654

Defendant next argues that he should not be subject to separate punishment for count six, assault with a deadly weapon by means of force likely to produce great bodily injury, and count seven, assault with a firearm, and their attendant firearm enhancements, because the assaults were committed during the course of the residential robbery.

Respondent concedes the point with respect to count seven, which was based on the display of the firearm for purposes of robbing M.B. The display of a firearm was therefore committed with the intent of committing the robbery, and should have been stayed pursuant to section 654.

Count six, however, was based on the separate act of pistol-whipping M.B. Section 654 does not prohibit separate punishment for "gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense." (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 191.) Here, the defendant's actions in

committing assault with a deadly weapon on M.B. was not reasonably necessary to the accomplishment of the original offense of residential robbery. Thus, there was no error in separately sentencing defendant for this offense.

Defendant further claims that the firearm use enhancements should be stayed, because a firearm use enhancement was imposed on count two. A firearm use enhancement, however, is attached to each underlying felony and is not treated differently from that felony. (See *People v. Bracamonte, supra*, 106 Cal.App.4th at p. 711.) The trial court did not error by imposing a separate firearm enhancement.

Presentence Custody Credits

Defendant next argues that a discrepancy exists between the presentence custody credit awarded and that which is supported by the record. This was not raised in the trial court, the preferred forum for addressing such errors in the first instance. (See *People v. Fares* (1993) 16 Cal.App.4th 954, 960.) Given that the case is being remanded for resentencing with regard to count seven, we direct the trial court to review and resolve the matter at that time.

Count Eight Enhancement

Respondent raises the issue of whether the enhancement charged as to count eight (kidnap to commit robbery) should have been stricken. This is an appealable issue. (§ 1238, subd. (a)(6).) Respondent, however, did not file a notice of appeal, and this should have been addressed by way of cross-appeal, not in the respondent's brief. As it is not pertinent to any issue raised by defendant, we decline to address it.

III

DISPOSITION

We reverse with respect to count seven and its enhancement only, which should have been stayed pursuant to section 654. The case is remanded for a new sentencing hearing, at which time the trial court shall also recalculate defendant's custody credits. In all other respects, the judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.